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PUBLIC UTILITY COMMISSION  
FILING CLERK

PROCEEDING TO DETERMINE MASS  
MARKET HOT CUT PROCESS FOR STATE  
IMPLEMENTATION OF THE FEDERAL  
COMMUNICATIONS COMMISSION'S  
TRIENNIAL REVIEW

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PUBLIC UTILITY COMMISSION  
OF TEXAS

### PRELIMINARY ORDER

This proceeding was established at the direction of the Public Utility Commission of Texas to approve and implement batch hot-cut processes for ILECs to follow pursuant to the Federal Communication Commission's (FCC's) Triennial Review Order (TRO).<sup>1</sup>

#### I. Background

The term "hot cuts" describes a variety of processes used to transfer customer loops from one carrier's switch to another's.<sup>2</sup> In the TRO, the FCC found that existing hot-cut processes are significant barriers to mass-market competitive entry in the absence of unbundled switching, due to inherent operational and economic difficulties.<sup>3</sup> In light of this finding, the FCC directed this Commission to address these barriers to competitive entry in each of the markets in which this Commission will evaluate impairment.<sup>4</sup> Within nine months of the TRO's effective date, this Commission must either: (1) approve a mass-market batch-cut process "that will render the hot[-]cut process more efficient and reduce per-line hot-cut costs" in each market; or (2) "issue detailed findings" showing that a batch-cut process is unnecessary for a particular market because

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<sup>1</sup> See *In re Review of the § 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Report & Order on Remand & Further Notice of Proposed Rulemaking (rel. Aug. 21, 2003) (TRO).

<sup>2</sup> *Id.* at ¶ 422.

<sup>3</sup> *Id.* at ¶¶ 422, 460.

<sup>4</sup> 47 C.F.R. § 51.319(d)(2)(ii).

existing hot-cut processes do not impair competition in that market.<sup>5</sup>

The TRO became effective on October 2, 2003.<sup>6</sup> The Commission, therefore, has until July 2, 2004, to complete this proceeding.<sup>7</sup>

## II. Procedural History

On April 7, 2003, the Commission established Project No. 27605, *Mass Market Hot Cut Process Project for State Implementation of the Federal Communications Commission's Triennial Review*. Four days later, the Commission issued a public notice announcing its intent to hold a workshop regarding batch hot cuts within two to four weeks following the release of the TRO text, and soliciting comments on batch hot cuts from interested parties. Following the TRO's release in August 2003, Commission staff conducted several workshops and conference calls in October and November 2003. Southwestern Bell Telephone, L.P. d/b/a SBC Texas (SBC) submitted its proposed batch hot-cut process on December 15, 2003. AT&T Communications of Texas, L.P. (AT&T), Covad Communications Co. (Covad), MCImetro Access Transmission Services, LLC (MCI), and Sage Telecom of Texas, L.P. (Sage) filed comments and counterproposals on January 5, 2004. On January 9, 2004, Commission Staff recommended abating Project No. 27605 and initiating a contested case to allow the Commission to develop and approve an SBC batch hot-cut process. At its January 15, 2004 Open Meeting, the Commission closed Project No. 27605 and converted it to the instant contested-case proceeding: Docket No. 29715, *Proceeding to Determine Mass Market Hot Cut Process for State Implementation of Federal Communications Commission's Triennial Review*. A prehearing conference was held on January 20, 2004. Commission Staff, AT&T, Covad, Sage, and SBC filed proposed lists of issues by the January 30, 2004 deadline.

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<sup>5</sup> TRO at ¶ 460.

<sup>6</sup> See 68 Fed. Reg. 52276-06 (Sept. 2, 2003) (to be codified at 47 C.F.R. pt. 51).

<sup>7</sup> TRO at ¶ 460.

### III. Jurisdiction

The Commission is acting under the federal authority granted to the FCC pursuant to section 251(d)(2) of the Federal Communications Act of 1934, which the FCC has delegated to the states to conduct analyses and approve batch-cut processes in accordance with federal guidelines. In addition, the Commission has complementary authority under state law to investigate competition in the telecommunications industry and to gather information in such an investigation through an evidentiary hearing.<sup>8</sup> The Commission has express authority to hold an evidentiary hearing to determine the level of competition in specific telecommunications markets, and may consider – among other things – the availability of telecommunications services and the existence of barriers to entry into markets.<sup>9</sup> The Commission may also hold hearings to investigate the effect and scope of competition in the telecommunications industry.<sup>10</sup> The Commission further has express authority to require certificated telecommunications utilities to report information to the Commission<sup>11</sup> and to issue subpoenas to compel the attendance of witnesses or the production of information.<sup>12</sup> No such powers are expressly given under the authority granted by the FCC.

### IV. Nature of Proceeding

In delegating authority to the states to make certain batch hot-cut determinations, the FCC specified factors that must be considered and certain parameters regarding the analyses leading to those determinations, set some deadlines, and established some procedures to challenge state action or inaction. Other than these areas, the FCC did not specify any procedures that must be followed.

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<sup>8</sup> See Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 14.003, 14.051, 51.001, 52.001, 52.054-055, 52.101-104, 52.201-207, 60.021-22 (Vernon 1998 & Supp. 2003).

<sup>9</sup> See *id.* at § 52.055.

<sup>10</sup> See *id.* at § 52.104

<sup>11</sup> See *id.* at §§ 14.003, 52.207.

<sup>12</sup> See, e.g., *id.* at §§ 14.051, 52.104, 52.205.

In this proceeding, the Commission will investigate existing and proposed hot-cut processes and seek to approve batch-cut processes that maximize operational and economic efficiencies that are not available under existing, line-by-line hot-cut processes, which requires that the Commission gather information related to existing and proposed cut processes. The Commission will then evaluate this information within the framework specified by the FCC. At the conclusion of this proceeding, the Commission will make factual findings required by the FCC following the methodology specified by the FCC to implement rules adopted by the FCC. The Commission will not approve customer contracts, detariff rates, or address whether any carrier is a dominant carrier. The detailed analysis requested by the FCC is necessary to properly determine the degree of unbundling of network elements required under federal law.<sup>13</sup> Consequently, this proceeding, being investigatory in nature and undertaken to fulfill requirements under federal law, will not result in a contested-case final order or rule as defined by the Texas Administrative Procedure Act.<sup>14</sup> Not every evidentiary hearing held by the Commission is subject to the contested-case requirements of the APA. As discussed below, however, the Commission has determined that it is appropriate to use, with very limited exceptions, its procedures that are applicable to contested cases.

This investigatory proceeding also is not an arbitration of an interconnection agreement or a resolution of a post-interconnection dispute. The Commission is not arbitrating the terms of access to an ILEC's network upon which the ILEC and a competing provider could not agree. No ILEC has indicated that it has received a request for interconnection, services, or network elements, and no parties have indicated that they entered into voluntary negotiations but were unable to resolve all issues. More importantly, no party has filed in this proceeding a petition for arbitration. Nor is any party seeking enforcement or interpretation of the terms and conditions of an interconnection agreement. Accordingly, although the results of this proceeding may ultimately have a bearing on interconnection agreements in some future proceeding, this proceeding is not an arbitration of an interconnection agreement or a resolution of a post-interconnection dispute.

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<sup>13</sup> TRO at ¶¶ 184, 186-90.

Due to the nature of the issues involved and the timelines faced under the TRO, the Commission concludes that this investigation should be conducted through a proceeding that utilizes the Commission's procedural rules for contested cases, except as discussed below. These exceptions, noted below, relate to bench requests and requiring parties to file testimony on specified issues to gather basic information regarding the degree of competition in specific telecommunications markets in Texas, and to motions for rehearing and reconsideration.

Thus, *ex parte* prohibitions shall apply, and interested parties may conduct discovery and avail themselves of the Commission's authority to compel the attendance of witnesses and the production of documents. Moreover, parties shall present factual information to the Commission by sworn evidence, and opposing parties will be allowed to challenge that evidence both by cross examination and by presenting controverting evidence. Parties to this proceeding will be required, however, to bring forth all information in their custody and control that would inform the Commission on issues it must address in this proceeding.

In addition, the Commission tentatively decides that the parties may make oral closing arguments in lieu of post-hearing briefs. Because the Commission is hearing this matter, no proposal for decision will be prepared and exceptions and replies are not necessary.

Finally, due to the nature of this proceeding, the timelines, and the opportunity for recourse to the FCC and federal courts, motions for rehearing are not required. Recourse to the FCC is provided if this Commission fails to perform under the authority delegated by the FCC,<sup>14</sup> and the FCC will provide guidance to and exercise oversight of this Commission's exercise of the authority delegated.<sup>15</sup> Consequently, any party dissatisfied by a decision of this Commission may seek a declaratory ruling from the FCC. Moreover, any party may seek a declaratory ruling from the FCC where necessary to remove uncertainty or eliminate a controversy.<sup>17</sup> In addition, a

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<sup>14</sup> See TEX. GOV'T CODE ANN. § 2001.001-902 (Vernon 2000 & Supp. 2004).

<sup>15</sup> See TRO at ¶ 190.

<sup>16</sup> See *id.* at ¶ 426 & ¶ 499 n.1552 (as modified by the Errata released Sept. 17, 2003, FCC 03-227).

<sup>17</sup> See *id.*

party may file a section 208 complaint with the FCC to ensure compliance with federal law.<sup>18</sup> As mentioned previously, the results coming out of this proceeding may find their way into Commission-held arbitrations. Any party aggrieved by a determination of this Commission in such an arbitration may seek review in an appropriate federal district court.<sup>19</sup> Given this oversight by the FCC and federal courts, and because this proceeding will not result in a contested-case final order, the Commission concludes that motions for rehearing are not appropriate. The Commission will, however, either ask for motions for reconsideration or issue preliminary findings and allow comment by the parties.

## V. Structure of this Proceeding

In this proceeding, the Commission will make a series of determinations regarding batch cuts for each of the markets in which we will evaluate local-circuit-switching impairment pursuant to 47 C.F.R. § 51.319(d)(i). The Commission must first determine the appropriate volume of loops that should be included in a “batch.”<sup>20</sup> Next, we will adopt specific processes that ILECs are to employ in performing batch cuts, “taking into account the ILEC’s network design and cutover practices.”<sup>21</sup> The Commission will also evaluate “whether the [ILEC] is capable of migrating multiple lines served using unbundled local circuit switching to switches operated by a carrier other than the [ILEC] for any requesting telecommunications carrier in a timely manner,” including the possible imposition of performance measures for provision of high volumes of loops.<sup>22</sup>

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<sup>18</sup> *See id.*

<sup>19</sup> *See* 47 U.S.C. § 252(e)(6).

<sup>20</sup> 47 C.F.R. § 51.319(d)(2)(ii)(A)(1).

<sup>21</sup> *Id.* at § 51.319(d)(2)(ii)(A)(2).

<sup>22</sup> *Id.* at § 51.319(d)(2)(ii)(A)(3).

The Commission will adopt rates for batch-cut activities pursuant to the FCC's pricing rules for unbundled network elements.<sup>23</sup> The rates will reflect efficiencies associated with batched-loop migration to requesting carriers' switches, either through a reduced per-line rate or through volume discounts, as appropriate.<sup>24</sup>

If the Commission concludes that the absence of batch hot-cut processes is not causing impairment in a particular market, the Commission will provide detailed supportive findings and a batch hot-cut process will not be ordered for that market.

## VI. Issues To Be Addressed

After reviewing the pleadings submitted by the parties, the Commission identifies the following issues that must be addressed in this docket.

1. Pursuant to the TRO, what are the Commission's obligations with respect to approving a batch hot-cut process?
2. Which of the foregoing obligations is the Commission required to complete within the TRO's nine-month deadline?
  - a. Is the Commission obligated to approve and implement a batch hot-cut process within nine months?
  - b. Is the Commission obligated to establish a batch hot-cut process within nine months to be subsequently implemented by incumbent LECs?
  - c. Is testing of a batch hot-cut process and any related performance measures required prior to Commission adoption and/or implementation of the process?
3. What volume of loops should be included in a "batch"?
4. What specific processes should be required when an ILEC is performing a batch cut?
5. For lines that are served via unbundled local circuit switching, is the ILEC capable of migrating a batch of such lines to non-ILEC switches in a timely manner?

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<sup>23</sup> *Id.* at § 51.319(d)(2)(ii)(A)(4)

<sup>24</sup> *Id.*



6. What performance measures, if any, should the Commission require that ILECs comply with for provision of high volumes of loops?
7. What rates should the Commission adopt for any batch-cut processes that the Commission approves?
8. Is the absence of a batch-cut migration process impairing requesting telecommunications carriers' ability to serve end users using DS0 loops in a particular market without access to unbundled local circuit switching?
9. Will approval of a batch hot-cut process remove hot-cut issues as basis for impairment in the relevant market(s)?
10. Will approval of a batch hot-cut process remove hot-cut issues as potential "exceptional sources of impairment" under TRO ¶ 503 in the relevant market(s)?
11. Should an approved batch hot-cut process include voice-plus-data loops (line-shared and/or line-split loops)?
12. In what geographic areas, if any, must an approved batch hot-cut process be implemented?
13. What are the appropriate costs to be considered in setting rates for a proposed batch hot-cut process?
14. To what extent is SBC's batch hot-cut proposal consistent with the TRO and with 47 C.F.R. § 51.319(d)(ii)(a)?
15. To what extent is Covad's batch hot-cut counter-proposal consistent with the TRO and with 47 C.F.R. § 51.319(d)(ii)(a)?
16. To what extent is Sage's batch hot-cut counter-proposal consistent with the TRO and with 47 C.F.R. § 51.319(d)(ii)(a)?

This list of issues is not intended to be exhaustive. The parties and the ALJ are free to raise and address any issues relevant in this docket that they deem necessary, subject to any limitations imposed by this Order, by the ALJ, or by the Commission in future orders issued in this docket. The Commission reserves the right to identify and provide to the ALJ in the future any additional issues or areas that must be addressed.

## **VII. Issues Not To Be Addressed**

The Commission takes the position that the following issues need not be addressed in this proceeding for the reasons stated.

**1. The benchmark “batch-cut” rates being set in Docket No. 28607.**

The goal of this proceeding is to establish a batch-cut process and determine the rate for that process. In Docket No. 28607, however, the Commission is setting a benchmark for the batch-cut process for each market that would not result in impairment when considering all of the other economic factors at issue in Docket No. 28607. Comparing the batch-cut rate set in this proceeding and the benchmark established in Docket No. 28607 will establish impairment determinations, for particular markets.

**2. The definition of markets in which this Commission will evaluate impairment in local circuit switching.**

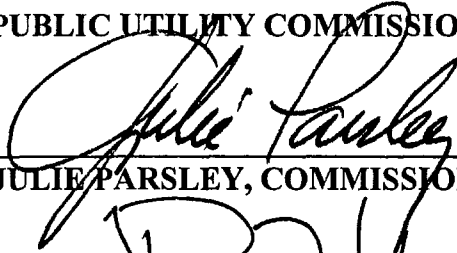
The determination of the relevant geographic areas to be included in each market for purposes of evaluating local-circuit-switching impairment pursuant to 47 C.F.R. § 51.319(d)(i) will be made in Docket No. 28607, and not in this proceeding.

**VIII. Effect of Preliminary Order**

The Commission’s discussion and conclusions in this Order regarding issues that are not to be addressed should be considered dispositive of those matters. Questions, if any, regarding issues that are not to be addressed may be certified to the Commission for clarification if the ALJ determines that such clarification is necessary. As to all other issues, this Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order at hearing. The ALJ, upon his or her own motion or upon the motion of any party, may deviate from the non-dispositive rulings of this Order when circumstances dictate that it is reasonable to do so. Any ruling by the ALJ that deviates from this Order may be appealed to the Commission. The Commission will not address whether this Order should be modified except upon its own motion or the appeal of an ALJ’s order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

SIGNED AT AUSTIN, TEXAS the 13<sup>th</sup> day of February 2004.

PUBLIC UTILITY COMMISSION OF TEXAS

  
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JULIE PARSLEY, COMMISSIONER

  
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PAUL HUDSON, CHAIRMAN